Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., *et al.*,

Petitioners,

v.

BOAT OWNERS ASSOCIATION OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a boat tower be found liable for unfair competition in violation of the Lanham Act, based on a single, private radio communication with the United States Coast Guard that was not directed to, nor legally interceptable by, nor heard by, any consumer?

PARTIES TO THE PROCEEDING

The only parties to the proceeding before the Court of Appeals whose names do not appear in the caption are Glen F. Rosenberger and Richard B. Beck.

The corporate petitioners have no parents and there are no publicly held companies that own 10% or more of the stock of either corporate petitioner.

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Petitioners, Sea Tow South Palm Beach, Inc., Sea Tow Services of the Palm Beaches, Inc., Glenn F. Rosenberger and Richard B. Beck ("Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (No. 98-4671, February 1, 1999) is unreported (App. A), and *per curiam* affirms the judgment of the district court (95-8707-CV-KLR, December 2, 1997) (App. C) which was amended on March 27, 1998 (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 1, 1999 (App. B). No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Lanham Act, 15 U.S.C. § 1114(1), provides:

> Any person who shall, without the consent of the registrant, use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution or advertising of

any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . .

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1125(a)(1)(A) provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1127, states, in pertinent part,

[f]or purposes of this Act, a mark shall be deemed to be in use in commerce . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce . . .

47 U.S.C. § 605(a) provides, in relevant part:

> . . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 C.F.R. § 80.89(d) provides:

> 80.89 Unauthorized transmissions.
>
> Stations must not: . . .
>
> (d) When using telephony, transmit signals or communications not addressed to a particular station or stations. . . .

47 C.F.R. § 80.373 provides:

80.373 Private communication frequencies.

This section describes the carrier frequencies assignable for ship-to-ship and ship-to-coast private communications.

. . .

(f) Frequencies in the 156-162 MHz band. The following tables describe the carrier frequencies available in the 156-162 MHz band for radiotelephone communications between ship and private coast stations. (Note: the letter "A" following the channel designator indicates simplex operation on a channel designated internationally as a duplex channel.)

Frequencies in the 156-162 MHZ band

Channel designator	Carrier frequency (MHz)		Points of communication (Intership and between coast and ship unless otherwise indicated)
	Ship Transmit	Coast Transmit	
	Port Operations		

. . .

	Noncommercial		
68 fn17	156.425	156.425	
69	156.475	156.475	
71	156.575	156.575	
7	156.625	---------	Intership only.
78A	156.925	156.925	
79A	156.975	156.975	Great Lakes only.
80A	157.025	157.025	Do.
67 fn14	156.375	---------	Intership only.
. . .			
	Liaison, U.S. Coast Guard		
22A fn11	157.100	157.100	Ship, aircraft, and coast stations of the U.S. Coast Guard and at LakeMead, Nev., ship and coast stations of the National Park Service, U.S. Department of the Interior.

fn11 The frequency 157.100 MHz in authorized for search and rescue training exercises by state or local government in conjunction with U.S. Coast Guard stations. Prior U.S. Coast Guard approval is required. Use must cease immediately on U.S. Coast Guard request.

U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy states, in relevant part:

3.B.5. Policy

3.B.5.a. Distress

Immediate response will be initiated, if feasible, to any known situation in which the mariner is in imminent danger. . . .

3.B.5.c. Guiding Principles in Non-Distress Cases

When specifically requested assistance, such as a commercial firm, marina, or friend, is not available, a request for assistance will be broadcast. If a commercial provider is available and can be on scene within a reasonable time (usually one hour or less) . . . no further action by the Coast Guard, beyond monitoring the incident, will be taken. . . .

3.B.5.i. Use of Government Frequencies

Government frequencies are reserved for authorized use by government agencies . . .

3.B.6.h. Communications Interference

If someone interferes with government communications, issue the command "CEASE TRANSMISSION." If interference continues, document the incident and process as an FCC violation.

STATEMENT OF THE CASE

The fundamental question in this case is whether a single, private, radiotelephonic communication with a governmental agency over a governmental frequency, for which interception, use or interference is statutorily prohibited, can give rise to a Lanham Act violation. Without doubt, both the letter and spirit of the Lanham Act are intended to protect consumers from promulgations that are likely to cause them to be confused about the source or origin of goods or services. Yet, where consumers have no right to listen to, rely on, or use private communications, it cannot fairly be said that such communications are actionable under that Act.

Participants in radiotelephone communications have a reasonable expectation of privacy. Indeed, while even cellular telephone communications can be intercepted by any amateur radio operator, such interception would be a direct violation of federal law. It is antithetical that where interception of a communication would be a violation of law, an illegally intercepted communication can be construed as a public advertisement. Nonetheless, this paradox is precisely at the heart of this case.

A. Background of the Case.

Respondent alleged that Petitioners engaged in trademark infringement and unfair competition, in violation of the Lanham Act, by holding themselves out to the Coast Guard, on one occasion, as being authorized to provide towing services to members of the boating public on behalf of Respondent.

The District Court granted Respondent's motion for summary judgment, holding that "The [Respondent's] mark was used in a manner that satisfies the Lanham Act's interstate commerce requirement. . . ," and that "This unauthorized use is likely to cause confusion." This holding was predicated solely upon a single, isolated incident that occurred on July 3, 1995, following radio communications between the United States Coast Guard Station in Ft. Lauderdale, Florida ("Coast Guard") and the operator of a vessel called "Mad Hatteras." This was followed by radio communications between the Coast Guard, Captain Rosenberger and a licensee of Respondent, known as Offshore Marine Towing ("OMT"), all on Channel 22A, a governmental channel relegated solely to U.S. Coast Guard liaison activities, and not authorized for public, commercial or non-commercial use.

In particular, on July 3, 1995, the Coast Guard received a radio communication from the "Mad Hatteras," seeking towing assistance. During that communication, the vessel owner stated that "we would prefer BOAT/U.S. if possible."

After speaking with the vessel operator, the Coast Guard sought a commercial tower over Channel 22A for the "Mad Hatteras." OMT responded to the Coast Guard. Captain Rosenberger also responded to the Coast Guard. Neither OMT nor Captain Rosenberger ever responded to, or spoke with, the "Mad Hatteras." The Coast Guard never invited or authorized the public to listen to or participate in any of the communications on Channel 22A.

After Captain Rosenberger advised the Coast Guard that his boat could respond to the "Mad Hatteras," OMT, recognizing that the vessel operator could not hear the

communications among Captain Rosenberger, the Coast Guard and OMT, stated to the Coast Guard, "Our understanding was that this gentleman wanted a BOAT/U.S. tower, can you please confirm that and let him know that we are the BOAT/U.S. tower?" Captain Rosenberger then stated to the Coast Guard, "Station Lauderdale, this is Sea Tow. Be advised we are a BOAT/U.S. tower." OMT then stated, "Be careful Glenn," to which Captain Rosenberger responded, "Larry, you be careful too, we have a contract to be able to do this under BOAT/U.S."

The facts are as follows: (a) there were no communications whatsoever between the distressed vessel owner and Petitioners; (b) there were no communications whatsoever between the distressed vessel owner and anyone other than the Coast Guard; (c) the only communications had by Captain Rosenberger, on behalf of Petitioners, were with the Coast Guard and OMT, neither of whom could possibly have been confused, and neither of whom is a consumer of commercial towing services; and (d) the communications had by Captain Rosenberger were not legally interceptable by, nor heard by any member of the public.

There was no participation on the part of the "Mad Hatteras" in the communications among the Coast Guard, Captain Rosenberger and OMT, nor were such communications heard aboard the "Mad Hatteras." The "Mad Hatteras" could not hear any of the communications as shown by OMT's request that the Coast Guard inform the vessel that OMT was "the Boat U.S. tower." Captain Rosenberger made no representation to the "Mad Hatteras." Captain Rosenberger was not even capable of having *any* communication with the vessel.

Moreover, the communications at issue were all transmitted via Channel 22A, rendering them communications that the public, by law, has no right to intercept, use or rely upon.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SANCTIONED A DRAMATIC DEPARTURE FROM ESTABLISHED PRECEDENT BY UPHOLDING A FINDING OF A LANHAM VIOLATION IN THE ABSENCE OF BOTH A USE IN COMMERCE AND ANY LIKELIHOOD OF CONSUMER CONFUSION.

Thousands of consumers call upon boat towing companies for assistance every year. Such calls are transmitted via VHF radio, typically by use of the public hailing and distress frequency (Channel 16). Often, the Coast Guard, which does not itself provide towing services in non-distress situations (i.e., those posing a genuine threat to life and limb, *see* U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.a. and c.), will seek to locate the boater's choice of a private tower to provide assistance. Through that process, the boater is switched to Channel 22A, the frequency designated by law for use by the Coast Guard only, and those permitted by the Coast Guard to join. (*See* 47 C.F.R. § 80.373(f)). Thus, the communications between the Coast Guard and the boater are shielded from intrusion by the public (*See* U.S. Coast Guard Addendum to the

National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.i. and h.)

Towers may be permitted by the Coast Guard to engage in private radio communications on Channel 22A in non-distress cases. (*See* U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy § 3.B.5.c.) When this occurs, the public is not a party to the ensuing communications and, indeed, is prohibited by statute (47 U.S.C. § 605(a)), regulation (47 C.F.R. §§ 80.89(d), 80.373(f)), and Coast Guard policy (U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy § 3.B.5.) from intercepting or interfering with such communications. When such communications are exchanged, as was the case here, the responding tower and the Coast Guard may discuss circumstances surrounding the prospective tow, including the identity and whereabouts of the boater, and whether the boater has requested the services of a particular towing company or its licensee. Such communications are exchanged under circumstances in which the tower has an expectation of privacy, and is not engaged in advertising its services to the public or in making representations for public ears or consumption.

As discussed below, to cloak such communications with prospective Lanham Act liability as a "use in commerce" which would be "likely to cause confusion" is contrary to the letter, spirit, and purpose of unfair competition law. Indeed, the prospect of consumer confusion is the "ultimate test." *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S.

763, 780; 112 S. Ct. 2753, 2763; 120 L. Ed. 615 (1992) (Stephens, J., concurring). That test simply cannot be satisfied in the case at bar.

A. A single radio communication directed solely to the Coast Guard is not likely to cause confusion among an appreciable number of consumers

The object of unfair competition law is to protect consumers from confusion as to the source or origin of goods and services.

> Confusion of the public is the essence of both trademark infringement and unfair competition. Almost all trademark disputes are between firms that use conflicting marks; the consumer is not a party to the litigation. But it is the consumer's state of mind that largely controls the result. . . . In this sense, protection of trademarks is merely a facet of consumer protection. As a result, the plaintiff in trademark litigation may accurately be characterized as the "vicarious avenger" of consumer interests.

1 *McCarthy On Trademarks and Unfair Competition*, § 2:33, at 2-57-58 (West 1998) (citations omitted). As stated in *The Hertz Corporation v. Avis, Inc*, 725 F. Supp. 170, 171 (S.D.N.Y. 1989), "Advertising . . . that fails to reach *the consuming public* [emphasis added] does not come within the purview of the Lanham Act, which is aimed primarily at *consumer* protection . . ."

This policy of *consumer* protection is not implicated by the facts presented by a circumstance, such as that

involved here, in which a tower engages in a private communication with the Coast Guard that is not directed to or intended for consumers. Here, no consumer heard, or even had a right to hear, such communication. Indeed, the law prohibits any consumer from intercepting the communication or using any information conveyed therein.

This Court should hold that this communication is not, by its very nature, likely to cause confusion among any — much less an appreciable number of — consumers, as is required under applicable precedents. *See, e.g., Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 1175 (2d Cir. 1976) (conduct constitutes trademark infringement if "it is likely to mislead many consumers"). As stated in *Mushroom Makers, Incorporated v. R.G. Barry Corporation*, 580 F.2d 44, 47 (2d Cir. 1978), "It is well settled that the crucial issue in an action for trademark infringement or unfair competition is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." *See also Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956).

B. A private radio communication directed to the Coast Guard is not a "use in commerce"

An essential element of a claim for trademark infringement is proof that the defendant engaged in an infringing use of the plaintiff's trademark "in commerce." 15 U.S.C. § 1114(1). Pursuant to 15 U.S.C. § 1127, "[f]or purposes of this Act, a mark shall be deemed to be in use in commerce . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce . . ."

Petitioner did not use Respondent's trademarks in selling or advertising their services. Instead, Captain Rosenberger, on a single occasion, told the Coast Guard on a private, restricted, Coast Guard-regulated frequency, that Petitioners were under contract with Respondent to render towing services. These facts do not satisfy the commerce requirement of Section 1114(i). Such a statement does not constitute the display or advertising of a trademark in connection with the sale or advertising of services in commerce. Captain Rosenberger was not seeking to sell or advertise services to the Coast Guard or OMT.

While Respondent argued that the "in commerce" requirement was satisfied by Captain Rosenberger's statement to the Coast Guard because Congress has the power to regulate the "airways" and "waterways," and that Captain Rosenberger's communication was a public radio broadcast within the definition of "commerce" set forth in 15 U.S.C. § 1127, not all radio communications are "public." Indeed, Federal law protects the privacy of radio communications not intended for persons to whom they are not directed, 47 U.S.C. § 605(a), and the regulations and Coast Guard policy specifically protect VHF radio privacy. Indeed, 47 C.F.R. § 80.373, which governs all VHF marine radio frequencies, is entitled "*Private* communication frequencies." (Emphasis added.)

There was nothing "public" about Captain Rosenberger's statement to the Coast Guard. The non-public nature of that statement reflects the error in the District Court's findings and the Eleventh Circuit's affirmance. Petitioners did not use or display Respondent's trademark to sell or advertise. Rather, on a single occasion, Captain Rosenberger responded to a broadcast from the Coast Guard

concerning the "Mad Hatteras," and, after OMT stated that it was under the impression that the vessel wanted a Boat U.S. tower, told the Coast Guard that Petitioners were under contract with Respondent. That statement, while found to be incorrect, cannot be equated with advertising or selling services in commerce. Clearly, Captain Rosenberger was not engaged in "selling" Petitioners' services to the Coast Guard. Nor was Captain Rosenberger engaged in "advertising," the *sine qua non* of which is the intent to reach public consumers. "Advertise" means "[t]o give notice to, inform or notify, give *public* notice of, announce *publicly*, notice or observe. . . . It includes publication by hand bills, signs, billboards, sound tracks and radio . . . or in a newspaper, or by means of placards or other written *public* notices . . ." *Black's Law Dictionary*, at 74 (West 1968; emphasis added). Similarly, "advertisement" means "Notice given in a manner designed to attract *public* attention. . . . Information communicated to the *public*. . . ." *Id.* (Emphasis added.)

Here, Captain Rosenberger was not making a public announcement or seeking to advise, inform or notify the public of anything. He was making a private statement to the Coast Guard, a statement offered only in response to OMT's telling the Coast Guard that it was under the impression that the "Mad Hatteras" had expressed a preference for a Boat U.S. tower. This is not "advertising" and does not threaten to "deceive a substantial segment of the intended audience (potential consumers . . .) . . ." *Valu Engineering, Inc. v. Nolu Plastics, Inc.*, 732 F. Supp. 1024, 1026 (N.D. Cal. 1990). Nor does it qualify as a representation having a "material . . . effect on buying decisions... made in connection with interstate commerce." *Energy Four, Inc. v. Dornier Medical Systems, Inc.*, 765

F. Supp. 724 (N.D. Ga. 1991). *See also Paramount Picturers Corporation v. Video Broadcasting Systems, Inc.*, 724 F. Supp. 808, 814 (D. Kan. 1989) ("The Lanham Act proscribes advertisements which mislead the *public* [emphasis added] into believing that the trademark owner has sponsored, endorsed or authorized the use of the mark or that the owner is otherwise connected or affiliated with the [infringer] . . ."). Thus, it is clear that Petitioners did not use Respondent's trademark "in commerce."

CONCLUSION

This case presents a question of exceptional importance — whether a Lanham Act violation can be founded upon a single, private radio communication with a governmental agency. If the decisions below are allowed to stand, the traditional requirements under the Act — use in commerce and likelihood of confusion by consumers — will have been eliminated. By granting the petition, however, this Court can correct the Eleventh Circuit's decision, which defies clearly established precedent that the elements of commercial use and likelihood of confusion must be satisfied, and in so doing, reaffirm the importance of protection of consumers over the creation of private rights of action where there has been no wrong.

Respectfully submitted,

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